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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 781

MRS. WANDA MERCER,

Petitioner,

vs.

PARIS THERIOT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May It Please the Court:

For convenience reference herein to the petition for certiorari shall be abbreviated with the letter P followed by the page number.

JURISDICTIONAL STATEMENT

Petitioner does not present the jurisdictional requirements set forth in the United States Supreme Court Rule 15, 1, (b), (i), (ii), (iv), in that this Court is not informed that this is a diversity case[1] in which the substantive law of Louisiana applies; the Court is not informed that a rehearing was not applied for, nor are the

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[1] 28 U.S.C. Sec. 1332.

cases petitioner contends sustains the jurisdiction cited in the jurisdictional statement.

The requirements of Rule 19, 1, and Rule 19, 1 (b) are not met, and respondent denies that the decision of the Court of Appeals for the Fifth Circuit is not in harmony with or is repugnant to decisions of other Courts of Appeals.

QUESTIONS PRESENTED FOR REVIEW

The questions here are the authority of any Federal Appellate Court to review the rulings of the Trial Court on motions made by a defendant under Rules 50 and 59 of the Federal Rules of Civil Procedure, and to consider errors and defects in the proceedings which affect the substantial rights of a party.

Respondent denies that petitioner's statement of questions presented is proper or pertinent, and particularly denies that the Court of Appeals decided any controverted issue of fact, or that any such issue of fact is before this Court.

The particular questions before the Court of Appeals were the legal questions of the sufficiency of the evidence to warrant submission of the case to the jury and to support the verdict, and whether or not errors of law were committed on the trial of the case. The Court of Appeals decided both of these questions affirmatively.

STATUTES INVOLVED

Rule 50 of the Federal Rules of Civil Procedure.
Rule 59 of the Federal Rules of Civil Procedure.
LSA-C.C. Art. 2315.[2]

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[2] The pertinent portion of which is as follows:- "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; * * *."

28 U.S.C. Sec. 2111.[3]

STATEMENT OF THE CASE

Petitioner is not Wanda Lane Mercer but Wanda Lane, wife of Eugene Herron, who remarried "almost a year and a half" after the death of Mercer (R. 176). Admittedly this is not too important, but it is inaccurate to designate petitioner as "Wanda Lane Mercer" (P. 8).

Petitioner's statement of the case seems designed to lead this Court into the belief that respondent appealed from the judgment rendered on the verdict simply because the jury reached the wrong conclusion. The case was heard by the Court of Appeals on questions of law raised by appeal from the judgment entered on the verdict of the jury and from the judgment denying respondent's motion for judgment notwithstanding the verdict and for a new trial (R. 303).

There is no issue of fact involved here, but in determining the sufficiency of the evidence it is necessary to search the record for those vital elements of proof necessary to warrant submission of the case to the jury. Primarily, it is the absence of these elements of proof which led the Court of Appeals to remand the case.

Facts which should have been but were not established and were necessary to support the allegations of the complaint and to meet the requirements of law for a *prima facie* case were that Mercer was walking along the highway about three feet from the edge of the paved portion thereof when he was negligently struck from the rear by Theriot, who was operating his automobile in

[3] "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of parties".

an negligent manner and at a rapid rate of speed (R. 3). The record, as well as petitioner's statement of the case, is devoid of any facts to establish that Mercer was walking along the highway at any time, or particularly that he walked the three to five miles to his home in the rain when he customarily rode (R. 170, 175). Likewise, as found by the Court of Appeals, there is no evidence whatsoever of negligence of Theriot and, on the contrary, an uncontradicted eye witness testified that Theriot was operating his vehicle in a careful, prudent manner (R. 193 *et seq.*).

Similarly, the record is devoid of evidence that decedent met his death as a result of injuries sustained by being struck by an automobile, and evidence of the where, when, why and how his injuries were sustained, or by whom or in what manner inflicted.

Other statements of fact contained in petitioner's brief are misleading and occasionally erroneous. Misleading is the statement that the bartender served Theriot ten or fifteen drinks (P. 4). Theriot was with other people and the bartender did not remember how many drinks were served nor did anyone testify that Theriot drank ten or fifteen drinks. In fact, the bartender testified that he was completely sober and in full possession of his faculties (R. 154).

Petitioner's statement that **Gautreaux arrived at the scene at 6:30 A.M. on December 19th, 1955 and made photographs while the body was still in the position where it had been found** is completely erroneous (P. 5). Gautreaux did not arrive at the scene until 9:45 or 10:00 A.M. (R. 80, 83). No evidence was introduced as to where the body was originally found, by whom it was found, or that it had not been tampered with in the

approximately three and one-half hour period between its discovery and Gautreaux's arrival.

Erroneous is petitioner's statement that Mercer died about 7:30 P.M. on December 18 (P. 4). Plaintiff's Exhibit 2 gives the date of death as December 19, 1955 and the time of death as 10:15 o'clock A.M. The death certificate, plaintiff's Exhibit 1, states the date of death to be December 18, 1955 and the time of death 7:30 P.M. It therefore appears that Mercer was dead when Theriot entered his automobile at a place approximately two miles distant from the position where the body was found the next morning, or he was injured and died after Theriot left Grand Island.

Erroneous is petitioner's repeated statements that the testimony revealed that the damage to Theriot's car was caused by contact with a soft object (R. 7). This testimony, which an expert could not give without actual tests, was objected to on the trial (By the Court, R. 36, 90; By Counsel, R. 44, 89, 91, 110), the objections were maintained, but the jury considered it, as the objectional testimony continually recurred, just as it was argued to the Court of Appeals and is argued to this Court.

Likewise, the tire tracks are meaningless as no attempt whatsoever was made to establish that the tracks were made by defendant's automobile.

Folse's testimony that he saw blood in the tire tracks is valueless as he did not arrive at the scene until after the body was moved and did not know where the body had been (R. 221, 230).

It will further be noted that petitioner claims here that Mercer was run over while on the shoulder of the

road thus accounting for the substance beneath the car, but points to a blue mark on the hood of the car, otherwise unidentified, to prove he was struck and knocked into the air over the hood of the car. There was no evidence that the blue spot (P. 6) was dye stain, nor was there any attempt made to match it with the clothes deceased was wearing.

Petitioner refers to a hair-like substance beneath the car (P. 6), but the testimony was that the substance was some fibrous substance which could have been weed, animal hair, fur, string or thread, and the witnesses did not know whether it was hair or not (R. 47, 110, 123, 214, 215).

Guidry did testify that he found a towel in the car but his testimony was uncorroborated by the officers, nor was the theoretical towel taken as evidence as stated by petitioner.

The testimony as to the evidence after it reached the Sheriff's Office was that the envelopes had been opened, but there was no testimony that the evidence immediately disappeared or was destroyed, nor was it explained why new scrapings could not have been taken (R. 94, 95, 105).

The Court of Appeals comments at length on Folse's testimony that there had been a pay-off in the case, which testimony by any stretch of the imagination does not link defendant with the negligent killing of a human being, or making a "pay-off".

The statement of petitioner that Theriot gave conflicting explanations as to the cause of the damage to his automobile (R. 6) is not supported by credible evi-

dence. Millet carefully placed Theriot out of earshot of all of the other witnesses except his (Millet's) uncle, Guidry, and testified that Theriot told him he struck a cow. The evidence revealed that prior to making this so-called damaging admission, Theriot had already taken all of the other police officers to the scene of an accident he had had the previous day; they had viewed the scene, saw the car tracks and taken as evidence the piece of wood Theriot stated had damaged his car, and which was found where Theriot stated he had thrown it. The car had run off of the road, thus accounting for any fibrous objects under it (R. 45, 97, 211, 212, 213).

We argued below and the Court of Appeals commented in its decision on petiitoner claiming in one breath that the sale of Theriot's business for which he received a note (incidentally subject to levy under execution) was an admission of guilt, and at the same time establishing insurance coverage. (P. 7).

We also commented below on defendant's statement in brief to the Court of Appeals that Theriot had killed two other individuals. This evidence was ruled inadmissible by the Trial Judge and did not reach the jury. Petitioner offered in evidence, out of the presence of the jury, Theriot's deposition, which reveals that in one accident twenty years ago and another accident thirty years ago, fatalities were involved. It is incorrect to state that Theriot "admitted running over two other individuals" as contended by petitioner (P. 7). This information was brought to the attention of the Court of Appeals by petitioner **without argument or citation of authority to establish its admissibility in evidence,** but simply in an attempt to influence the Court with an incorrect statement of inadmissible evidence. The same attempt is here made.

The only established facts are that Mercer died at 7:30 P.M.; Theriot left the Fishermen's Bar & Resturant, approximately two miles from the point where Mercer's body was found the next day, at 7:30 or 7:45 P.M., and Mercer was dead when Theriot got into his automobile. There were no eye witnesses to an accident, but there was an eye witness that Theriot was not involved in an accident in leaving Grand Isle (R. 194).

Established also and admitted by Theriot was that his car was damaged in the front, such damage having been noted while Theriot's car was parked during the day (R. 235). It was further established that some unidentified fibrous matter similar to a weed growing in the area (also found by Guidry) was found under the car. There was no evidence that decedent was killed as a result of being struck by an automobile or that Theriot was under the influence of liquor or was negligent in any respect in the operation of his automobile. There was no evidence that decedent at any time was walking along the side of the highway.

Petitioner's statement of the case therefore reveals not that which was proved, but that which was not established and which of necessity was required to have been established to support a verdict or to warrant submission of the case to the jury.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner fails to show that her application comes under any of the application rules of the United States Supreme Court, and her statement of jurisdiction does not set out all the requirements provided in Rules 15 and 19 of this Court.

Petitioner attempts to establish in this Court that the Court of Appeals found facts contrary to those found by the jury. The Court of Appeals considered only questions of law which it could properly consider under the jurisprudence and under Amendment 7 of the Constitution of the United States.

The issues before the Court of Appeals, and properly decided by it, were whether or not the Trial Judge erred in denying defendant's motion for an instructed verdict made at the close of plaintiff's case and renewed at the close of the evidence, which included consideration of defendant's further motion for judgment notwithstanding the verdict and for a new trial. Also at issue was the question of whether or not errors of law were committed during the trial of the case, including improper instructions to the jury.

The Court of Appeals properly found that prejudicial error of omission and commission occurred during the trial which prejudiced defendant and deprived him of a fair trial.

There was insufficient evidence to sustain the verdict or to warrant submission of the case to the jury, and the Court of Appeals was correct in reversing the judgment and remanding the case.

The opinion of the Court of Appeals was predicated on well recognized grounds.

ARGUMENT

We briefly herewith set forth the law governing this case and then comment on the points raised by petitioner.

Under the provisions of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114

A.L.R. 1487, this being a diversity case, the substantive law of Louisiana applies.

The pertinent Louisiana Statute is LSA-C.C. Article 2315, and the provisions thereof under which this suit was brought are, as follows:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; * * * ."

The basis of an action under this Article is fault.

Jones v. Texas & P. Ry. Co., 125 La. 542, 51 So. 582, 136 Ann. St. Rep. 339;

Lange v. Illinois Cent. R. Co., 107 La. 687, 31 So. 1003;

Larkin v. State Farm Mut. Auto. Ins. Co., 233 La. 544, 97 So. 2d 389.

Where Rule 50 (b) has been complied with, as was done in this case, the re-examination prohibition of Amendment 7 of the Constitution of the United States does not preclude a Federal District Court from entering judgment notwithstanding the verdict, or an Appellate Court from making such disposition when, as a matter of law, a motion for directed verdict should have been sustained.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849;

Globe Liquor Co. v. San Roman, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177;

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 174;

Ryan Distributing Corp. v. Caley, 3rd C., 147 F. 2d 138;

Simerson v. St. Louis & S. F. R. Co., 8th C., 173 F. 2d 612.

The powers of a Federal Appellate Court, although more circumscribed than those of the Trial Court, permit it to grant a new trial for errors of law which intervened in the proceedings.

Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 51 S. Ct. 513, 75 L. Ed. 1188;
28 U.S.C. Sec. 2111.

Where a motion for directed verdict is made at the close of plaintiff's case and repeated at the close of the entire case, the Appellate Court will examine the evidence to the extent of determining whether there is sufficient evidence to take the case to the jury and this raises only a question of law.

Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879;
Fairmount Glass Works v. Fork Coal Co., 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439;
Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458;
Minnehaha County, S. D. v. Keller, 8th C., 150 F. 2d 356.

The Trial Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who is our jurisprudence stands charged with full responsibility.

Patton v. Texas & Pacific R.R. Co., 179 U.S. 661, 21 S. Ct. 275, 45 L. Ed. 361.

An erroneous ruling which relates to the substantial rights of a party is grounds for reversal unless it affirmatively appears from the whole record that it was not prejudicial.

28 U.S.C. Sec. 2111;

McCandless v. U. S., 56 S. Ct. 764, 766, 298 U.S. 342, 80 L. Ed. 1205;

United States v. River Rouge Improvement Co., 269 U.S. 411, 421, 46 S. Ct. 144, 70 L. Ed. 339;

Fillipon v. Albion Vein Slate Co., 250 U.S. 76, 82 39 S. Ct. 435, 63 L. Ed. 853;

Williams v. Great Southern Lumber Co., 277 U.S. 19, 26, 48 S. Ct. 417, 72 L. Ed. 761;

U. S. v. Meagley, C.A. Ill., 239 F. 2d 637.

The Supreme Court or Courts of Appeals may reverse for errors appearing on the face of the record even though unassigned.

Lamb v. Cramer, 52 S. Ct. 315, 285 U.S. 217, 76 L. Ed. 715;

McBride v. Neal, 214 F. 966,

United States v. Tennessee & Coosa Railroad Co., 176 U.S. 242, 20 S. Ct. 370, 44 L. Ed. 452;

Weems v. United States, 217 U.S. 349, 30 S. Ct. 544;

Fairmount Glass Works v. Krebs Fork Co., Supra;

Gregg v. United States, 8th C., 116 F. 2d 609;

Fentrele v. United States, 5th C., 209 F. 2d 159;

DuPont De Nemours & Co. v. Cudd, 10th C., 176 F. 2d 855 (Inherent power to correct errors);

Hite v. Western Maryland R.R., 4th C., 217 F. 2d 781, cert. den. 75 S. Ct. 890;

Robinson v. Pennsylvania R.R. Co., 3rd Cir., 214 F. 2d 798;

American Trust Co. v. New York Credit Men's Association, 2nd Cir., 207 F. 2d 685;

United States v. Tenn. & Coosa Co., Supra.

Although ordinarily an Appellate Court does not consider issues not raised below, there are exceptional cases in which Courts may depart from the ordinary rule

where injustice would otherwise result.

Tresler v. C. I. R.R. Co., 4th C., 306 F. 2d 538;
Kreinbring v. U. S., 8th C., 216 F. 2d 671;
United States v. Chesapeake & Ohio Ry. Co., 4th C., 215 F. 2d 213;
Robinson v. Pennsylvania R.R. Co., Supra.

Although not necessary to the determination of the issue here, this Court has recognized that the determination of the jury on the credibility of witnesses and the weight of the evidence may be disturbed where there is extreme abuse of such function.

Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S. Ct. 720, 724, 35 L. Ed. 371;
Sartor v. Arkansas Natural Gas Corporation, 64 S. Ct. 724, 321 U.S. 620, 88 L. Ed. 967.

In the instant case motions for directed verdict were made by defendant at the close of plaintiff's evidence and again at the close of all evidence; a motion for judgment notwithstanding the verdict was filed within the time prescribed and a motion for a new trial was timely filed. Under such procedure, this Court has unfailingly recognized the rights of the Appellate Court to review the proceedings and either remand or reverse.

Johnson v. New York, N. H. & H. R. C., 73 S. Ct. 125, 344 U.S. 48, 92 L. Ed. 77;
Foundation v. Filson, 336 U.S. 681, 69 S. Ct. 754, 93 L. Ed. 971.

Although we leave for the Court's determination from the record the question of misconduct of opposing counsel, being satisfied that there are sufficient errors in the proceedings in the Trial Court to warrant the disposition of the case made by the Court of Appeals, the law is that misconduct of counsel, even though not ex-

cepted to, may be so flagrant as to require reversal.

Pine v. United States, 5th C., 135 F. 2d 353, cert. den. 64 S. Ct. 40, 320 U.S. 740, 88 L. Ed. 439; *Robinson v. Pa. R.R. Co., Supra.*

With the above background in law, we briefly answer the contentions of petitioner.

1.

The Trial Did Go Out Of Bounds.

Petitioner contends that errors were not committed during the trial, and that defendant's contention that inadmissible evidence was heard by the jury is negatived by the record (P. 11).

Repeatedly the jury was told by witnesses, despite objections, and by repeated questions of plaintiff's counsel, that a "soft" object caused the damage to the fender of Theriot's vehicle (R. 36, 44; question repeated R. 89, 110). In argument, again despite objections having been sustained, the jury was told that the damage to the vehicle was caused by striking a human body (R. 258, 259, 263).

The Court maintained an objection to the opinion of a witness of the nature of the white substance (R. 108), then permitted the witness to give his opinion (R. 109). In argument, counsel for petitioner stated that "Old Dutch Cleanser was on the car" (R. 259).

The jury was told in argument, simply a conclusion of counsel, that Theriot was so drunk that he did not know what he was doing (R. 257) and that he was a hit and run driver (R. 257).

The jury was further told by petitioner's attorney

that Mercer was walking along the highway (R. 258, 276) and exactly how Mercer was struck by Theriot's automobile; further that Theriot had a complete disregard for human life and it was suggested that he deliberately ran over Mercer (R. 263, 264).

As found by the Court of Appeals, the argument was made to the jury that the insurance policy would pay the damages and, in the same breath, that Theriot sold his business to "get his property beyond the reach of seizure" (R. 264). That Theriot was "an irresponsible killer and fleer" (R. 265). Also, that the blue dye on the car matched Mercer's clothes, and that the blood and hair came from the body of Mercer (R. 259); that Theriot was responsible for the disappearance of the evidence and a "pay-off" (R. 259, 262, 276, 277), all without substantiating evidence.

The Trial Judge completely eliminated any evidence of prior accidents but this Court is informed "that Theriot admitted running over two other individuals" (P. 7). Not only is this an incorrect statement, but the accidents referred to occurred, one twenty and the other thirty years in the past. Without any disclosure of the facts of those accidents they were argued to the Court of Appeals and now are argued to this Court, without any suggestion of the admissibility of the evidence but simply in an attempt to influence the Court. Although petitioner states that inadmissible evidence did not reach the jury we have briefly demonstrated that not only did such evidence reach the jury but is argued in this Court in the same breath in which petitioner claims that these proceedings were held within bounds.

2.

The Court Of Appeals Was Not In Error In Reversing And Remanding The Case.

We take exception to the statement in petitioner's brief that counsel for defendant advised the Trial Court, at any stage of the proceedings, that defendant had no objection to the charge (P. 20). The referred to statement in the petition is completely without foundation in truth or fact.

The record shows that after the judge had instructed the jury, both general and special instructions, counsel was requested to step up to the bench whereupon there was a conference (R. 290). At this conference the judge informed counsel that the jury would be retired and that exceptions to the charge would be made "as before the jury retired". This is corroborated by the record (R. 291) as the referred to agreement was made when counsel was at the bench.

Defendant objected to the charge, found to be erroneous by the Court of Appeals, at the first opportunity (R. 291); other objections were made which the Court of Appeals found it unnecessary to consider but which warranted reversal (R. 293).

Even if petitioner's statement in brief were correct, it would have availed defendant nothing to have objected at an earlier time, had the opportunity presented itself, as the record shows that the judge did not believe he had given the erroneous charge and took no steps in connection therewith until after the record was checked.

When this charge is considered in connection with the Court conditioning the jury, at the time they were

impaneled and before evidence was heard, to find for plaintiff without evidence, the foundation was laid for a verdict based upon guess work, speculation, conjecture and venon (R. 310, 311).

We submit that the record amply shows that the Trial Judge was derelict in his duty and abused his discretion, in, at the least, failing to order a new trial in this case when he had an opportunity to do so on motions filed, brifed and argued.

It would be repetitious to state all of the grounds noted by the Court of Appeals, and those appearing on the face of the record not mentioned by the Court of Appeals in support of its action in this case. If error was committed by the Court of Appeals, it consisted of remanding the case rather than reversing and entering judgment for defendant.

WHEREFORE, respondent requests this Honorable Court to deny the petition for certiorari.

Respectfully submitted,

ROBERT G. HUGHES,
1702 American Bank Building,
New Orleans 12, Louisiana,
Attorney for Respondent.

PROOF OF SERVICE

I, Robert G. Hughes, attorney for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief in opposition to Petition for Writ of Certiorari on Warren E. Miller, Esq., Suite 1012, Barr Building, 910 Seventeenth Street, N.W., Washington, D. C., and H. Alva Brumfield, Esq., 205 American Bank Building, Baton Rouge, Louisiana, by mailing a copy thereof, postage prepaid, addressed as herein set forth.

Dated this 15th day of April, 1959.

Robert G. Hughes